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Nos. 88-854, 88-855, 88-856, and 88-870

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In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of legislative immunity barred the imposition of civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

2. Whether the district court abused its discretion in imposing civil contempt sanctions against members of the Yonkers City Council as a proper remedy for the refusal of the City of Yonkers, acting through the Yonkers City Council, to comply with the consent decree.

3. Whether the First Amendment prohibited the district court from imposing civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

4. Whether the district court violated the Due Process Clause in holding petitioner Peter Chema in contempt.

5. Whether the City of Yonkers may be held in civil contempt when, acting through the Yonkers City Council, the City refuses to comply with the consent decree.

6. Whether the district court's imposition of escalating fines for the City of Yonkers' civil contempt violates the Excessive Fines Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 856 F.2d 445.[1] The pertinent orders and opinions of the district court contained in petitioners' appendices are unreported: order requiring compliance with consent decree, July 26, 1988 (Pet. App. 160j-163j); modification letter, July 28, 1988 (Pet. App. 159i); oral opinions finding petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 4, 1988 (Pet. App. 98g-99g, 129h-132h, 143h-144h, 157h); orders adjudicating petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 5, 1988 (Pet. App. 72f-74f; 88-855 Pet. App. 65a-67a; 88-870 Pet. App. 15a-18a).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The petitions for a writ of certiorari were each filed on November 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After more than 90 days of trial in 1983 and 1984, the district court issued an opinion on November 20, 1985, holding petitioner City of Yonkers liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.* *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985). The court found that the City of Yonkers had deliberately concentrated virtually all of its

[1] "Pet. App." refers to the appendix to the petition in No. 88-854, unless otherwise indicated.

public and subsidized housing in the southwest quadrant of Yonkers in order to maintain racial segregation. The court based its holding in large part upon the actions and inactions of the Yonkers City Council and individual Council members. See 624 F. Supp. at 1295-1328, 1342-1363, 1369-1372.[2]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order" that required the City of Yonkers and the Yonkers City Council to take a number of actions designed to facilitate the development of public and subsidized housing outside of Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[3] Part VI of the Order required the City, by November 1986, to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See *id.* at 1582.[4] The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable for the development of such housing, or to prescribe how such housing should be provided. In-

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[2] Evidence of segregative intent included City Council members' acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (624 F. Supp. at 1369-1372), the City Council's reluctance to seek federal Section 8 housing certificates and, when the certificates were obtained, the confining of their use to minority families only in Southwest Yonkers (*id.* at 1342-1363).

[3] As petitioner City of Yonkers acknowledges, the Yonkers City Council is the City's governing authority (88-855 Pet. 5 n.3). Unless the context otherwise requires, we will therefore refer collectively to the City of Yonkers and the Yonkers City Council as the City.

[4] Part IV of the Housing Remedy Order required the City to designate sites for 200 units of public housing in East Yonkers. 635 F. Supp. at 1580-1581.

stead, the court left to the City both the opportunity and the responsibility for proposing the substantive aspects of the Plan. *Ibid.* The City, however, refused to submit any proposal for the Long Term Plan (Pet. App. 6a-7a). Indeed, the City took "no significant action to comply with the 1986 Housing Remedy Order" for the first year and a half after its entry (*id.* at 7a).[5]

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[5] The City's recalcitrance was not limited to the Long Term Plan. The City also refused to designate public housing sites, as required by Part IV of the Housing Remedy Order (Pet. App. 5a-6a). In December 1986, after the City had refused to submit a Long Term Plan proposal, the United States moved to have the City held in contempt. The Yonkers Branch of the National Association for the Advancement of Colored People, representing the class plaintiffs, meanwhile moved for the appointment of a special master to carry out the City's responsibilities under the Housing Remedy Order. The district court permitted the City to avoid contempt sanctions only after the City agreed to hire an Outside Housing Advisor to assist it in carrying out the Housing Remedy Order. Nonetheless, throughout 1987, the City continued to frustrate the court's and the plaintiffs' efforts to implement that Order. *Id.* at 7a. In fact, as the history of this litigation shows, the City acted constructively only when threatened with contempt. See, *e.g.*, *United States* v. *Yonkers Bd. of Educ.*, 662 F. Supp. 1575 (S.D.N.Y. 1987) (88-856 Pet. App. 1j-23j) (City Council took steps to advance its own remedy plan only after court threatened contempt and fines); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1407, 1410 (S.D.N.Y. 1987) ("It will come as no surprise to anyone familiar with the history of this litigation that the City has acted in a negative or at best neutral fashion with respect to all efforts to implement the Court's Housing Remedy Order, and that any initiatives to further such implementation have come from the Plaintiffs, Plaintiff-Intervenors, or the Court itself."); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413, 1414 (S.D.N.Y. 1987) ("[T]he attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.").

The City appealed the district court's orders, although implementation of the Housing Remedy Order was not stayed (Pet. App. 6a). In a lengthy opinion, the court of appeals affirmed the district court's orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, Nos. 87-1632 and 87-1686 (June 13, 1988).

2. In January 1988, following the court of appeals' affirmance of the district court's orders, the parties negotiated the "First Remedial Consent Decree In Equity" (Consent Decree), which set forth the actions the City would take in order to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order (Pet. App. 178*l*-185*l*). The Yonkers City Council approved the Consent Decree on January 27, 1988. The district court entered the decree as a consent judgment on January 28, 1988. *Id.* at 8a.

Sections 12 through 18 of the Consent Decree established the framework for the Long Term Plan that had been left unresolved in the original Housing Remedy Order (Pet. App. 182*l*-185*l*). The Decree set a goal of 800 units of assisted housing to be developed over four years in conjunction with market rate housing developments (*id.* at 182*l*-183*l*), and committed the City to specific actions needed to encourage private developers to build such housing (*id.* at 182*l*-184*l*). In Section 17, the City expressly agreed to adopt legislation providing for development incentives such as zoning changes, tax abatements, and density bonuses, within 90 days after entry of the Decree (*id.*

at 184*l*).[6] In Section 18, the parties acknowledged that certain "subsidiary issues" relating to the Long Term Plan remained unresolved and agreed to work toward their resolution in a second consent decree by February 15, 1988 (*id.* at 184*l*-185*l*).

Faced with intense public opposition to the Consent Decree, the City sought to avoid compliance with it. On March 21, 1988, the City moved to modify the Decree. The City even promised to return nearly $30 million in federal funds if it were relieved of its duty to allow the development of public housing in white neighborhoods, a request that ignored the fact that the City had been found liable for intentionally segregating public and subsidized housing (Pet. App. 9a). The district court denied the City's motion on March 31, 1988. As a result, the City refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree, or to enact the legislation required by Section 17. *Id.* at 9a-10a.[7]

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[6] The Consent Decree specifically provided (Pet. App. 182*l*) that

> [t]here shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

Additional measures that the parties agreed to forgo for a time included the use of City-owned land (*id.* at 183*l*).

[7] Undaunted by the district court's order, the City, on May 2, 1988, moved to vacate the Consent Decree in its entirety on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Consent Decree. The district court denied the motion. The City sought no further review of that ruling. See *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 859-861 (2d Cir. 1988) (88-856 Pet. App. 7k-9k, 12k n. 1), petition for cert. pending, No. 88-1029.

On June 13, 1988, the district court entered its Long Term Plan Order that resolved the issues left open by the Consent Decree and provided the detail for the legislation that Section 17 required. That Order was based upon a draft prepared by the City's attorneys before the City withdrew from negotiations. The court entered the order after the plaintiffs had submitted a joint motion and proposed order, the City had submitted comments, and the court had held a hearing. The Order accommodated most of the City's objections to the proposal (Pet. App. 9a-10a, 164k-177k).[8]

Yet the City continued its program of resistance. On June 21, nearly two months after the deadline set in the Consent Decree for the City's enactment of legislation necessary to implement the Long Term Plan (and more than two years after entry of the original Housing Remedy Order), the district court asked the Yonkers City Council to pass a resolution adopting the provisions of the Long Term Plan Order (Pet. App. 10a).[9] The Council refused and on June 28 actually defeated a resolution that would have required the City to honor its previous commitments

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[8] The City challenged in the court of appeals only one substantive aspect of the Long Term Plan Order that concerned its state law authority to grant tax abatements (Pet. App. 31a). The court of appeals affirmed the entry of the Order (*id.* at 31a-32a). None of the petitioners challenges that aspect of the court of appeals' decision here.

[9] The court's request was not merely the result of the City's default in its Long Term Plan obligations under the Consent Decree. On June 14, the day after this Court denied the City's petition for a writ of certiorari to review the court of appeals' affirmance of the district court's liability and remedy orders (No. 87-1686 (June 13, 1988)), the City Council passed a resolution declaring a moratorium on all public housing construction in Yonkers—an unabashed defiance of the district court's Housing Remedy Order and the Consent Decree. Pet. App. 10a.

to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order. On July 11, the City told the district court that it would not voluntarily comply with the Consent Decree (although it had earlier approved that Decree) and, in trying to shirk all of its responsibilities, suggested that the court simply enact the Long Term Plan legislation itself (*ibid.*).

3. On July 26, 1988, the district court entered an order, proposed by the United States, that required the City, no later than August 1, 1988, to enact the legislation (known as the Affordable Housing Ordinance) required by Section 17 of the Consent Decree, and as set forth in the Long Term Plan Order (Pet. App. 160j-163j).[10] The July 26 Order also scheduled a hearing for August 2, at which time the City and individual members of the City Council who had voted against the Ordinance would be required to show cause why each should not be held in civil contempt if the Affordable Housing Ordinance were not enacted. The Order established the sanctions for such contempt: the City would be fined at a base rate of $100 for the first day and the fine would double for each day of noncompliance thereafter; the Council members would be fined $500 per day and imprisoned after 10 days of continued defiance. All contempt sanctions would end if and when the City enacted the legislation. *Id.* at 161j-162j.[11] By letter dated July 28, in response to the City's concerns that state law required notice and public hearing before the City Council voted on the Ordinance, the district court made clear that the July 26 Order would be satisfied if the

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[10] Consultants retained by the City had drafted the Affordable Housing Ordinance, based upon the terms of the Consent Decree and the Long Term Plan Order (Pet. App. 11a).

[11] All fines would be paid into the Treasury of the United States and would not be refundable (Pet. App. 162j).

City Council passed a resolution committing the City to enact the Ordinance after state law requirements had been met (*id.* at 12a, 159i). All petitioners had notice of the court's July 26 Order and its July 28 letter (*id.* at 18a).[12]

On August 1, by a vote of four to three, the City Council defeated a resolution declaring the City's intent to adopt the Affordable Housing Ordinance. Petitioners, City Council members Spallone, Longo, Fagan, and Chema, voted against the resolution (Pet. App. 12a, 134h).[13] The district court therefore held show cause hearings on August 2 and 4 (*id.* at 115h-158h, 75g-99g). Finding that their refusal to comply with the Consent Decree was "but the latest of a series of contempts" (*id.* at 130h), the district court adjudged the City and the four Council members in civil contempt and imposed sanctions in accordance with the July 26 Order.[14]

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[12] Before entering the July 26 Order, the district court had considered but rejected a proposal to create an "Affordable Housing Commission" to take over the City Council's powers and responsibilities under the court's various remedial orders. The City, speaking as usual on behalf of the City Council, opposed creation of the Commission on the ground that it would have divested the Council of its "core legislative as well as executive functions" (Pet. App. 11a; City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988)). The United States also opposed the proposal, arguing that the City itself should be required to comply with its obligations and be held accountable for its failure to do so. See Comments of the United States 4-6 (July 22, 1988).

[13] At its August 1 meeting, the City Council scheduled for August 15 a public hearing on the Affordable Housing Ordinance, as required by state law. Following the August 15 hearing, the City Council again rejected the Ordinance by vote of four to three. Pet. App. 13a, 16a-17a.

[14] In response to the Council members' contentions that they had an inadequate time to prepare for the hearing, the court allowed each of them until August 5 to request an evidentiary hearing, a hearing that

4. On August 9, the court of appeals stayed the contempt sanctions pending appeals by the City and the individual Council members (Pet. App. 68d-71e). On August 26, the court of appeals affirmed the adjudications of contempt against both the City and the Council members, but limited the fines against the City so that they would not exceed $1 million per day (Pet. App. 1a-35a). The court of appeals made clear that "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa" (*id.* at 30a), and concluded that neither the City nor the Council members could escape responsibility for their refusal to comply with the Consent Decree that the City Council itself had approved (*id.* at 28a, 30a-31a).

5. On September 1, this Court stayed the sanctions against the Council members pending timely filing and disposition of petitions for writs of certiorari, but denied the City's motion for a stay. *Spallone* v. *United States*, Nos. A-172, A-173, A-174, and A-175 (Sept. 1, 1988) (Pet. App. 57c).[15] On September 9, with the City's contempt sanctions approaching a fine of $1 million per day, the City Council finally enacted the Affordable Housing Ordinance (Pet. App. 36b, 203o-205o).[16]

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would be held on August 8. The court ordered that all fines paid by the Council members would be held by the Clerk of the District Court until August 12, pending such a hearing. None of the Council members requested a hearing. Pet. App. 155h-156h.

[15] Justice Marshall, joined by Justice Brennan, dissented from the Court's stay of the sanctions against the Council members (Pet. App. 57c-67c).

[16] The City paid a total of approximately $820,000 in contempt fines. The Council member petitioners each paid $3,500 in such fines. Pet. App. 190n-200n.

ARGUMENT

The City of Yonkers, having been held liable for intentionally maintaining racially segregated public and subsidized housing, voluntarily agreed to undertake steps to remedy those substantial violations of the Equal Protection Clause and the Fair Housing Act. That commitment, specifically approved by the Yonkers City Council, was embodied in the Consent Decree entered by the district court after all parties, including the City of Yonkers, agreed to the terms. Reminiscent of the "fingerpointing" the Court saw earlier in this litigation between the City of Yonkers and the Yonkers Board of Education over the City's segregated schools,[17] the City of Yonkers here blames the Council for the protracted and wilful defiance of the federal court's lawful orders, while the individual Council members claim the privilege to renege on the commitment that the City of Yonkers and the Yonkers City Council previously gave to the court.

Both the district court and the court of appeals refused to recognize such a vacuum of governmental responsibility in the face of authoritative federal court orders designed to remedy racial discrimination in housing. The district court therefore imposed, and the court of appeals upheld, civil contempt sanctions to coerce the compliance that had long been overdue. That compliance is finally underway, the civil contempt sanctions have ended, and this litigation should not be unduly prolonged. The decisions below are correct. They do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioners' sweeping suggestions (*e.g.*, 88-854 Pet. 14; 88-856 Pet. 7; 88-870 Pet. 10), this case does not present the question whether the district court

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[17] See U.S. Br. in Opp. 7-8, *Yonkers Bd. of Educ.* v. *United States*, Nos. 87-1632 and 87-1686.

could have issued or enforced an order requiring the City Council to enact legislation absent the Council's consent. The court imposed the contempt sanctions here only to compel compliance with the Consent Decree that the City Council had approved. The district court's order of July 26 simply required the City Council to honor a commitment it had already voluntarily undertaken; the narrow question presented is thus whether the district court properly exercised its power to enforce compliance with that order.[18]

Despite the City Council's express endorsement of the Consent Decree, the Council member petitioners contend (88-854 Pet. 15-21; 88-856 Pet. 11-17; 88-870 Pet. 10-16) that the doctrine of legislative immunity absolves them from any obligation to comply with the district court's orders and shields them from sanctions for their decision to flout the Council's commitment to the court. In support of this broad proposition, petitioners rely principally on this Court's decisions holding state and regional legislators immune from liability in private actions brought under 42 U.S.C. 1983 for acts taken in their legislative capacities. *E.g., Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980); *Lake Country Estates, Inc.* v. *Tahoe*

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[18] Indeed, throughout the remedial process, the district court gave the City and City Council every opportunity to design the Long Term Plan itself. Under the Housing Remedy Order, the City was to submit a proposed plan; the City refused to do so. Under the Consent Decree, the City was to continue negotiations to resolve certain subsidiary issues relating to the Long Term Plan; the City refused to do so. Finally, the Long Term Plan Order entered by the district court was based upon a draft prepared by the City and was revised after the City's comments in order to accommodate most of its objections. Under such circumstances, petitioners' suggestions (*e.g.*, 88-854 Pet. 9-12) that the district court's orders were an excessive use of judicial power are groundless.

Regional Planning Agency, 440 U.S. 391 (1979); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). As the court of appeals properly concluded, however, those decisions do not relieve the Council members of their duty to comply "with a consent judgment to which their city has agreed and which had been approved by their legislative body" (Pet. App. 28a). Since the context of the contempt proceedings here is thus far removed from the circumstances in which this Court has upheld claims of legislative immunity, application of that doctrine to insulate petitioners' actions is unwarranted.[19]

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[19] In *Tenney* v. *Brandhove*, 341 U.S. 367, 379 (1951), for example, the Court held "only that [where] the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, * * * [42 U.S.C. 1983] does not create civil liability for such conduct."

Petitioners Spallone and Chema (88-854 Pet. 15; 88-856 Pet. 8) mistakenly suggest that the court of appeals' decision conflicts with those decisions holding that the doctrine of legislative immunity applies to local legislators. Although this Court has not resolved the question, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the courts of appeals have agreed that local legislators are immune from private actions brought under 42 U.S.C. 1983 that challenge their legislative decisions. See *Aitchison* v. *Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp.* v. *Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1193-1194 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce* v. *Riddle*, 631 F.2d 272, 274-279 (4th Cir. 1980); *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980). The court of appeals here assumed the correctness of those decisions (Pet. App. 25a), but recognized that this case presented a different question, namely, "whether * * * an order [requiring the enactment of legislation] may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's

This Court has made clear that "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 731; see *United States* v. *Gillock*, 445 U.S. 360, 369-373 (1980). That purpose is not implicated where, as here, the City Council had already voluntarily approved the Consent Decree. In that Decree, the City Council had agreed to enact legislation needed to implement the Long Term Plan. The district court's July 26 Order and the contempt sanctions that followed sought only to require the recalcitrant City and the Council members to honor that commitment. As this Court has emphasized, "all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); see *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958). The City Council independently exercised its legislative function on January 27, 1988, when it specifically approved the Consent Decree. The district court did not interfere with that legislative decision by subsequently ordering the Council to comply with the Decree when it failed to do so voluntarily.

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legislative body has voted in favor of such a consent decree" (*id.* at 27a); see also *id.* at 66c (Marshall, J., dissenting from grant of stay). Accordingly, this case is not the proper vehicle for addressing the issue left unresolved in *Lake Country Estates*—an issue that has not divided the courts of appeals—or broader issues of the proper scope of legislative immunity from actions for injunctive relief. See *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731-734 (1980); *Griffin* v. *County School Bd.*, 377 U.S. 218, 233 (1964) ("[T]he District Court may, if necessary to prevent further racial discrimination, require [county legislators] to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * *.").

Moreover, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity * * * [and] careful not to extend the scope of the protection further than its purposes require." *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. 5. The Court has thus hesitated to apply the doctrine of absolute immunity beyond the confines of *Tenney*, namely, "a civil action brought by a private plaintiff to vindicate private rights." *United States* v. *Gillock*, 445 U.S. at 372.[20] Here, in an action by the United States to vindicate the public interest in eradicating discrimination, the district court imposed contempt sanctions only to coerce compliance with its orders, not to preserve private rights. Any intrusion on the City Council's legislative process surely is minimal when the Council has already agreed to take the action required by the court. Moreover, the compelling public interest in the enforcement of federal court orders to remedy racial discrimination certainly outweighs any slight interference with the routine workings of the Council. See *United States* v. *Nixon*, 418 U.S. 683, 707, 708 (1974) (claims of absolute immunity and privilege must be balanced against "the role of the courts under Art. III" and "must be considered in light of our historic commitment to the rule of law"); *United States* v. *United Mine Workers*, 330 U.S. 258, 303 (1947) ("The interests of orderly government demand that respect and compliance be given to orders issued by courts * * *.").

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[20] For example, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *'." *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).

At bottom, the Council member petitioners claim a privilege, under the guise of legislative immunity, to choose whether to comply with a federal court order that the City Council itself had earlier approved. This claim far exceeds the bounds of the doctrine of legislative immunity recognized by this Court, a doctrine that seeks to promote independent and effective decisionmaking by legislators. That rationale for immunity cannot properly be extended to allow open defiance of a federal court decree, where the legislature has already consented to the entry of that decree as an appropriate remedy for discrimination.[21]

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[21] Petitioners Spallone and Chema also contend (88-854 Pet. 18-21; 88-856 Pet. 20-23) that they are not bound by the Consent Decree because they voted against it. As officers of the City of Yonkers (see N.Y. Pub. Off. Law § 2 (McKinney 1952)), individual Council members are bound by the Consent Decree, whether they personally agreed to it or not. Fed. R. Civ. P. 65(d); see *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 13-14 (1945). As the court of appeals stated, if a Council member is unwilling to abide by the decree, "his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them" (Pet. App. 28a).

The Council member petitioners, not joined by the City, attack the Consent Decree itself as the source of their obligation to adhere to the district court's orders. Petitioners did not raise those arguments before the court of appeals, and they have therefore not preserved those issues for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, each of these belately raised points is without merit and calls for no further review.

Contrary to the contentions of petitioners Chema, Longo, and Fagan (88-856 Pet. 4, 23-25; 88-870 Pet. 13), nothing in the Affordable Housing Ordinance contradicts the Consent Decree's proviso requiring only zoning changes that "are not substantially inconsistent with the character of the area" (Pet. App. 184*l*). Indeed, Article V of the Ordinance expressly requires that "the provisions of the underlying

zoning • • • [and] the impact of development on surrounding land uses and neighborhoods" be taken into account before allowing "[d]epartures from [existing] zoning regulations" (Pet. App. 229r).

Citing *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) (88-856 Pet. App. 1k-43k), petition for cert. pending, No. 88-1029, petitioner Spallone contends that "changed circumstances questioning the integrity of the Consent Decree and the propriety of the proposed legislation" justified his refusal to comply with the Decree (88-854 Pet. 21-22). *Yonkers Racing Corp.* involved challenges by two property owners (Yonkers Racing Corp. and St. Joseph's Seminary and College) to the City's condemnation of their land for use as public housing sites under the Consent Decree. After examining the circumstances surrounding the adoption of the Decree, the court of appeals upheld the condemnation of the site owned by Yonkers Racing (88-856 Pet. App. 20k-26k, 36k). Turning to the Seminary's site, however, the court of appeals remanded for further factfinding on the Seminary's First Amendment claims (*id.* at 26k-36k). The court of appeals neither questioned the integrity of the Consent Decree nor addressed the propriety of the proposed legislation at issue here. On the contrary, the court of appeals commended "[t]he patience exhibited by the district court under enormously trying circumstances" and urged the implementation of the Housing Remedy Order "as quickly, and hopefully as smoothly, as possible" (*id.* at 36k). Petitioner Spallone's contention is therefore baseless.

Finally, petitioner Chema (88-856 Pet. 20-22) argues that the Consent Decree may not bind the City and the City Council because the City agreed to it only after the court threatened to impose sanctions. That claim is simply wrong. In January 1988, when the City Council approved the Consent Decree, the City had been in default of its obligations under the Housing Remedy Order for more than a year and a half. The district court did indeed threaten to impose contempt sanctions on the City, not for its failure to enter into a consent decree, but only for its continued refusal to comply with the Housing Remedy Order. See 88-856 Pet. App. 6k, 8m-17m. The district court's threat to impose sanctions for the City's continued defiance could only be expected. Rather than undermining the validity of the Consent Decree ultimately approved, as petitioner Chema would suppose, the need for such threats simply highlights the longevity and extent of the City's contumacious behavior and the ultimate necessity for the sanctions at issue here.

2. Petitioners Spallone and Chema contend (88-854 Pet. 21; 88-856 Pet. 9-11) that the district court erred in imposing civil contempt sanctions to require them to comply with the Consent Decree. In their view, the district court should have either enacted the legislation itself or appointed a commission to do so.[22] A federal court has "inherent power to force compliance with [its] lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); see *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) ("a financial penalty may be the most effective means of insuring compliance"). While having alternative means of enforcement (see, *e.g.*, Fed. R. Civ. p. 70), a district court may exercise discretion in determining which sanctions will best "bring[] about the result desired." *United States* v. *United Mine Workers*, 330 U.S. at 304; cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (courts have broad discretion in designing remedies for constitutional violations).

Moreover, as the court of appeals acknowledged (Pet. App. 20a-21a), in imposing contempt sanctions a court

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[22] This argument contradicts the position the City Council had taken before the district court. In opposing the proposed commission, the City, speaking on behalf of the City Council, stated:

> [T]he City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. * * * As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988). Of course, enactment of the legislation by the court, as urged by the City in the district court and by the Council members here, would also have "divest[ed] the Council of specific state law powers."

must use " '[t]he least possible power adequate to the end proposed.' " *Shillitani* v. *United States*, 384 U.S. at 371 (citations omitted).[23] Here, the "end proposed" was the City Council's enactment of legislation, a step the City had expressly agreed to in the Consent Decree. Under the circumstances, either the court's enactment of the legislation itself, or its appointment of a commission to carry out the City Council's responsibilities under the Decree, would have been a greater, not a lesser, exercise of judicial power. See Pet. App. 64c (Marshall, J., dissenting from grant of stay) ("Surely it is both less disruptive and more effective to order compliance * * * than to usurp completely the Council's legislative authority and enact the legislation directly."). And enactment by the court or by an independent commission would not have achieved the essential goal of forcing the City to "recognize its obligation to conform to the laws of the land" by complying with the court's order (Pet. App. 121h). Accordingly, the district court did not abuse its discretion in imposing civil contempt sanctions.

3. Petitioner Chema contends (88-856 Pet. 17-20) that the district court violated his First Amendment right to free speech in ordering him to vote for the legislation, which the Council had earlier approved, and sanctioning him for his refusal to do so. No decision of this Court ex-

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[23] In *Shillitani*, for example, this limitation required the district court to consider civil contempt before criminal contempt (384 U.S. at 371 n.9), and allowed the court to imprison the contemnors, who had refused to testify before the grand jury, only for the life of that grand jury (*id.* at 371-372). That caveat did not limit the court's authority in the first instance to select civil contempt as the proper remedy to coerce compliance with its orders (*id.* at 370).

amining the individual rights of federal or state legislators has considered as protected speech a legislator's act of voting in his official capacity. Rather, the Court has looked to other constitutional principles in resolving individual legislators' challenges to constraints on their activities. See, *e.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. at 402-405 (doctrine of legislative immunity); *Gravel* v. *United States*, 408 U.S. 606 (1972) (Speech or Debate Clause); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (Speech or Debate Clause and doctrine of legislative immunity); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (separation of powers principle). To the extent that the First Amendment could even apply to a legislator's act of voting in his official capacity, petitioner Chema could not claim such protection here, where the legislative body to which he belongs, the City Council, had already committed itself to enact the legislation under the terms of the Consent Decree.[24] As the court of appeals recognized, whatever freedom individual Council members may have to express their views, that freedom "does not permit them to take action in violation of [the] law" (Pet. App. 28a). If petitioner Chema could not reconcile his obligation as a city official with his individual views, his recourse was to resign, not to defy the law.

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[24] Only two federal court decisions have been found suggesting that the First Amendment has any application to a legislator's act of voting. In *Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the district court granted a preliminary injunction against enforcement of a city council ordinance requiring each member to vote "aye" or "no" on every resolution (or face censure or fines). In concluding that the plaintiff council member had "a reasonable likelihood of success on the merits of her free speech claim," the court emphasized that under the council's procedures, a vote of "no" was functionally indistinguishable from an abstention, and thus no discernible purpose was served by requiring a "no" vote instead of an abstention (*id.* at

4. Petitioner Chema also asserts (88-856 Pet. 25-26) that the district court violated the Due Process Clause in holding him in contempt. The district court's July 26 Order, as modified by the July 28 letter, clearly explained Chema's duty to honor the commitment to enact legislation as required by the Consent Decree, notified Chema that the court would require him to show cause why he should not be held in contempt should he refuse to honor that commitment, and set forth the contempt sanctions to be imposed. See Pet. App. 160j-163j, 159i. At the August 2 hearing, Chema admitted to the district court that he had received notice of the July 26 Order and that he had voted against the legislation (*id.* at 157h). Thus, there was no need for the government to prove those stipulated facts, and the district court needed no additional facts in order to find Chema in contempt. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Chema also ap-

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668-669). We do not agree with the *Wrzeski* rationale, but in any event the present case is clearly different: a "no" vote (and similarly, an abstention) by a Council member constitutes official defiance of a federal court order based on the Council's own consent to the entry of a decree. Thus the purpose of subjecting a "no" vote to the sanction of contempt is manifest.

In *Clarke* v. *United States*, No. 88-3190 (D.D.C. Dec. 13, 1988), appeal pending, No. 88-5439 (D.C. Cir.), the district court held that the "Armstrong Amendment" (Tit. I, § 145 of the District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269), which conditioned the appropriation of funds to the District of Columbia on the District of Columbia City Council's modification of its law, placed "an unjustified burden on the first amendment rights" of the City Council members (slip op. 18). We disagree strongly with this opinion, and are in the process of appealing from the judgment. But the case, once again, is very different; indeed, the district court in *Clarke* itself distinguished the present case on the basis of the "compelling and public interest in obtaining compliance with federal court orders" (slip op. 9-10), as well as the existence of "the Council's own prior agreement to a consent decree" (*id.* at 10. n.6).

peared with his attorney at the August 2 show cause hearing and the district court gave him the opportunity to request an additional evidentiary hearing (Pet. App. 156h-157h); Chema made no such request (*id.* at 19a).[25] Accordingly, the court of appeals correctly concluded (*id.* at 17a-19a) that the district court's procedures in holding Chema in contempt were consistent with the Due Process Clause.

5. Petitioner City of Yonkers contends (88-855 Pet. 9-13) that the district court erred in imposing civil contempt sanctions against the City to coerce its compliance with the court's orders since only the City Council had the power to enact the legislation. The district court and the court of appeals correctly rejected this argument, which neither law nor common sense supports. Like all municipal corporations, the City of Yonkers functions through its governing bodies, and the official actions of the governing bodies constitute actions of the City. See *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 481 (1986).[26] Indeed, the responsibility of any corporation for the actions of its governing body is a fundamental tenet of our jurisprudence. Such entities are not exempt from legal accountability because they can act only through their representatives.

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[25] Despite Chema's blanket assertion, such a hearing would not have been "a mockery of justice" (88-856 Pet. 26). The Council members' checks in payment of their fines were to be held by the Clerk of the District Court until August 12 (Pet. App. 157h). Thus, had Chema been able to show cause at any later hearing why he should not have been held in contempt, the adjudication of contempt could have been vacated and his money returned.

[26] Furthermore, the court of appeals found that, as of the time of oral argument before that court, the City had not done all it could to obtain compliance with the district court's orders (Pet. App. 29a).

Moreover, the record belies the City's contention (88-855 Pet. 11) that it was unable to comply with the court's orders. The City Council did enact the legislation when the coercive effect of the fines against the City *alone* (that is, while the imposition of fines against the Council members had been stayed by this Court) became too strong to withstand. In short, the contempt adjudication against the City accomplished the limited goal the district court intended, by making continued refusals to comply with the court's orders an unacceptably costly course of action for the City to follow.

6. Finally, the City contends (88-855 Pet. 13-22) that the district court's imposition of escalating fines for the City's civil contempt violates the Excessive Fines Clause of the Eighth Amendment. This Court has stated that the Eighth Amendment was designed to apply to the "criminal-law function of government," *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), and has ruled that the Amendment does not prohibit "the exercise of the traditional remedy of contempt to secure compliance [with court orders]," *Uphaus* v. *Wyman*, 360 U.S. 72, 82 (1959) (coercive imprisonment did not violate the Cruel and Unusual Punishment Clause). Although the Court has granted certiorari to consider whether the Excessive Fines Clause applies to awards of punitive damages in civil cases, *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, No. 88-556 (Dec. 5, 1988), such an extension of the Eighth Amendment would not reach civil contempt sanctions. Unlike punitive damage awards, the City's contempt fines were imposed not to punish, but, as in *Uphaus*, to coerce compliance with the court's orders (Pet. App. 32a-34a). The City thus could avoid its burden at any time simply by complying. Indeed, the City did comply without having the fines reach the outer limit of $1 million per day.[27]

[27] Nor is there any objective indication that the imposition of allegedly burdensome civil contempt sanctions is an important public

In any event, even were the Excessive Fines Clause applied here, the City's payment of roughly $820,000 in contempt fines would fall within constitutional bounds. The Eighth Amendment requires that criminal penalties be proportionate to the crime committed; and in determining proportionality, the sentencing court considers the gravity of the offense and the harshness of the penalty, and compares sentences imposed in cases in the same and other jurisdictions. *Solem* v. *Helm*, 463 U.S. 277, 284-292 (1983).[28] And in reviewing sentences, the appellate court must give deference to the discretion of the trial court. *Id.* at 290. Such standards are similar to those governing the propriety of civil contempt sanctions. See *United States* v. *United Mine Workers*, 330 U.S. at 304 (in exercising its discretion, district court "must • • • consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired" (footnote omitted)).

The court of appeals here measured the fines the City potentially faced against the standards outlined above, taking into account the level of fines imposed in other cases,[29] the City's annual budget of $337 million, and the

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issue that merits this Court's attention. None of the public policy issues surrounding the controversy over punitive damages applies in the context of civil contempt sanctions. See *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (May 16, 1988), slip op. 7-8; *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-829 (1986).

[28] *Solem* applied the Cruel and Unusual Punishment Clause, but held that the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments • • •." 463 U.S. at 289 (citation and internal quotations omitted). Thus, the standards set forth in *Solem* would appear to apply to the Excessive Fines Clause.

[29] The court of appeals observed that this Court, in *United States* v. *United Mine Workers*, 330 U.S. 258, 305 (1947), "selected as an ap-

City's willingness to refund nearly $30 million in federal funds in order to avoid its obligations under another part of the Consent Decree. The court of appeals concluded that the fines imposed by the district court were necessary to compel compliance and excessive only to the extent that they would continue to double beyond $1 million per day. Pet. App. 33a-34a. Accordingly, the court of appeals correctly held that the imposition of escalating fines for the City's civil contempt (which actually reached $820,000) was not excessive. That holding does not warrant further review by this Court and the petition should not be held pending the resolution of *Browning-Ferris Indus.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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propriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days" (Pet. App. 33a).

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